[2018] NZTT Auckland 4140150

TENANCY TRIBUNAL AT Auckland

APPLICANT:	Josephus Franciscus Van Iersel Tenant
RESPONDENT:	Crockers Property Management Limited, Anil & Daya Investments Limited Landlord
TENANCY ADDRESS:	Flat 2, 24 Leonard Road, Mount Wellington, Auckland 1060

ORDER

1. Crockers Property Management Limited and Anil & Daya Investments Limited must pay Josephus Franciscus Van Iersel $2,503.29 immediately.

Description	**Landlord**	**Tenant**
Compensation: Cleanliness at outset		$350.00
Exemplary damages: Insulation statement		$350.00
Compensation: Oven/stove and repairs		$432.85
Compensation: Breach of quiet enjoyment		$350.00
Exemplary damages: Retalitory notice		$1,000.00
Filing fee reimbursement		$20.44
Total award		**$2,503.29**
Total payable by Landlord to Tenant		**$2,503.29**

Reasons:

1. The tenancy started on 9 December 2017 and ended on 7 July 2018. The property is a 3-bedroom dwelling in a block of 3 units built in the late 1960s.
2. The tenancy agreement states the landlord is Daya Anil & Daya Investments Limited however it appears the correct name of the company is Anil & Daya

Investments Limited. Crockers Property Management Limited acted as agent for the landlord from the commencement.

3. The tenant Josephus Van Iersel has brought an application seeking compensation and exemplary damages in respect of the following claims:
    - The landlord provided the property in an unclean condition at the commencement;
    - The landlord did not provide an insulation statement in the tenancy agreement;
    - The landlord failed to provide and maintain the premises in a reasonable state of repair and compliant with building, health and safety laws;
    - The landlord breached the tenant's quiet enjoyment in respect of the tenant's request for flatmates;
    - Retaliatory notice.

Cleanliness at start of tenancy and the entry inspection report

4. After considering all the evidence I find the landlord was in breach of their legal obligation to provide the property in a reasonably clean condition under section 45 (1) (a) Residential Tenancies Act 1986 (RTA).
5. At the time of viewing the property, the tenant says the premises were very unclean and the agent promised to professionally clean the dwelling before the tenancy commenced. At the start of the tenancy the premises were still in a similar unclean condition. The stove/oven was in a filthy condition and not working. Furthermore, the property walls were smeared with dirt, the drawers were covered with dirt and food residues, the kitchen floors were not cleaned and the bathroom extractor was dirty. The photographs provided by the tenant at the hearing demonstrate that the property was indeed in a very unclean condition. The tenant immediately emailed the landlord on 11 December 2017 detailing the lack of cleanliness and seeking an immediate response.
6. Balanced against these findings, I observe that Crocker's arranged for a cleaner to come to the property while the tenant was away in January 2018 to remedy the breach. Crockers say the first cleaner did not do a thorough enough job.
7. The tenant submits that Crocker's entry condition report was *"grossly inaccurate"* and demonstrated that the author of the report *"had never been inside the tenancy prior to writing the report"*. After examining the report and the evidence, I agree with the tenant's submission that it contains false information. For example, the entry report states *"brand new paint throughout property"* however the photographs indicate that it is a tried older property. The inspection report failed to accurately record the problems at the property. The oven/stove, drawers, window latches and walls were recorded as in a good or very good condition however in fact the oven was broken and dirty, cupboards and drawers were broken, some window latches were broken and

the walls were dirty. The report appears to have been a copy of the previous tenancy and at the end states *"I couldn't get access as your painter has not returned the keys".* This seems to indicate, as suggested by the tenant, that the agent in fact not been able to conduct an inspection at the outset.

8. The landlord accepts the photographs in the entry inspection do not represent the actual condition and are likely to have been taken at an earlier date.
9. I have considerable concerns about the inaccuracy of the entry property inspection report and accept that the property managers, in respect of this tenancy, did not exercise the necessary care and diligence expected from an experienced property management company from the outset.
10. After carefully reviewing all the evidence, I award compensation of $350.00 for the lack of cleanliness at the outset.

Insulation statement – section 13A (1A) – (1F)

11. Insulations statements in tenancy agreements (including boarding house agreements) have been compulsory since 1 July 2016.
12. The insulation statement must be signed by the landlord and contain the following information:
    - Whether or not, at the date of the agreement, there is any insulation in the ceilings, floors, or walls of the premises;
    - Details of the location, type and condition of all insulation, at the date of the agreement, in any ceilings, floors, or walls of the premises;
    - Where a landlord has been unable to obtain some or all of the required information, "despite making all reasonable efforts to do so", the statements must instead (s13A (1B) and (1C)):
        (a) Describe the information the landlord cannot obtain in respect of a particular location; and
        (b) Explain why the landlord could not obtain the information; and
        (c) Confirm that the landlord has made all reasonable efforts to obtain that information.
13. It is an unlawful act attracting a maximum of $500.00 exemplary damages, where (s13A (1F));
    - The landlord fails to comply with the requirements of the insulation statement; or
    - The landlord intentionally includes false or misleading information in the statement.
14. Letting agents signing up tenants under their standard tenancy agreement with the owner named as the landlord must obtain full and accurate details of insulation including product type (and *R* rating if known), location and condition for the property from the owners.
15. The insulation disclosure statement assists tenants looking for warmer rental properties for their families and also encourages landlords to become acquainted with the type and condition of the insulation in readiness for compulsory insulation on 1 July 2019.

16. Clause 28 of the tenancy agreement states *"Insulation. Note: To be confirmed."*
17. I find that the landlord was in breach of section 13A RTA by failing to include an insulation statement on the tenancy agreement signed by the landlord. The landlord has committed an unlawful act. The landlord says they were unaware of the status of insulation at the property which is why the agreement notes that it will be confirmed. Indeed, the landlord was unable to advise if a report had been obtained regarding insulation or if the tenant had been subsequently advised of the insulation at the property.
18. Crockers, being a professional property management company, should be aware of the laws regarding insulation statements which have in place for over 2 years. I am satisfied that exemplary damages at the upper end are warranted in this case as the landlord is an experienced property manager. I award exemplary damages of $350.00.

Oven / stove and other repair issues

19. After considering the evidence, I find the property was in a poor state of repair at the outset in respect of a number of issues in breach of section 45 (1) (b) RTA. These repair issues included 2 broken window latches, broken porch light fitting, the outside security lights "hanging loose" at rear of the carport, broken clothesline, broken and dirty oven/ elements and no signal on the TV aerial.
20. In early to mid-January 2018 the window latches were repaired by the landlord. I am satisfied the landlord responded in a timely manner in respect of the windows, although these should have been picked up at the outset.
21. However, the non-functioning TV aerial, broken porch light and loose carport light were never addressed during the tenancy. Photographs were provided for the porch light at the outset. The TV signal was mentioned by the tenant in emails dated 11 and 13 December 2017 and the outside light was mentioned in an email dated 14 January 2018. The landlord failed to repair these issues and they were never noted on the property inspection report.
22. The landlord says they were unaware of the issues of the TV signal and the porch light as these matters were emailed to the property manager Kyra rather than Ms Stephens whom the tenant was regularly in email contact. The tenant says Kyra's email was an address for service on the tenancy agreement and therefore the correct email to notify the property manager.
23. I am not persuaded by Crocker's submissions on these issues as they appear to be deflecting responsibility on the basis that their company did not ensure that property managers, covering properties for a short period on behalf of another property manager, are apprised of all correspondence from the tenant. The tenant is legally obligated to inform the landlord in writing of repair issues, a responsibility the tenant fully complied with, however the landlord appears to be deflecting responsibility on the basis that they did not check their

colleagues' email while covering for them or failed to update the tenant of a new email address for service.

24. Crockers Property Management Ltd, being a paid professional property management company, should ensure their systems and training is sufficient to enable property managers to comply with their positive obligations to repair and maintain the premises. This means entry inspections must be accurate and property managers are fully informed on repairs issues including notifications/complaints from the tenant. The evidence establishes that Crockers were not aware of repair issues from the outset despite their positive legal obligations and, even after being notified by email, failed to take reasonable action on some issues. I do not accept on the evidence that the property manager was unaware of the issue in respect of the TV signal as maintained, as the matter was mentioned twice in the tenant's emails.
25. The oven and elements were dirty and broken at the outset. Nine days later on 18 December 2017 the landlord installed a reconditioned second-hand oven. On 14 January 2018, the new oven malfunctioned (loud bang and spark) giving the tenant's mother an electric shock. The unsafe reconditioned oven shorted the fuse. All elements would not work until the fuse was replaced by the landlord's contractor 24 days later on 7 February 2018.
26. There was a padlock fitted to the outside door of bedroom 3. I find that an external lock on a bedroom is a health and safety breach as the occupant of the bedroom may be locked inside in the event of a fire. Such external locks on bedrooms should be removed in residential properties. Exemplary damages on this issue is not justified as it appears the breach was not intentional.
27. After considering all the evidence I award a rent reduction of $60.00 per week for the oven/stove for 33 days in the amount of $282.85.
28. I also award a further $150.00 for the landlord's failure to repair and maintain the other issues during this tenancy (total compensation $432.85).

Did the landlord breach the tenant's quiet enjoyment over the question of flatmates/maximum numbers?

29. Under section 38 RTA the landlord must ensure that their actions do not interfere with the peace, comfort or privacy of the tenant in the use of the premises.
30. The property is a 3-bedroom unit. Clause 22 of the agreement states that *"The tenant acknowledges that the property is for occupation by not more than 1 adult and 0 children and not to permit more than 1 person to occupy the property at one time".*
31. The tenant advised the Crocker's agent at the viewing of the property and at the time of signing that he wished to get in a couple of flatmates for the other 2 bedrooms. The tenant says the property manager indicated she was fine with this. A brief time after signing the agreement the tenant noticed clause 22

restricting the maximum number of occupants in the property to one person. He believed this was an error and asked for the agreement to be corrected. The property manager advised that as the tenant was requesting a variation of the maximum numbers under the agreement, a charge of $100.00 per additional person would be required to process this request.

32. At the hearing, the landlord says Mr Van Iersel was the sole tenant applying for the property and that Crocker's policy in such a case is to record one person as being able to occupy the property. They say any flatmates would have to be credit checked before they were permitted to occupy the property and that allowing unauthorised persons to occupy the premises would conflict with the owner's insurance.

33. The question for the tribunal is whether the landlord's behaviour is in breach of any provision of the RTA or an interference with the tenant's quiet enjoyment.

34. I have reached the view that the landlord's actions were a breach of the tenant's quiet enjoyment. In my opinion, the question of maximum numbers should have been a matter the parties discuss and agree upon at the outset based on the number of bedrooms and the tenant's future plans. The evidence establishes that the landlord imposed a maximum number of one person in a 3-bedroom home without any discussion with the tenant and despite being advised by the tenant would he would be seeking flatmates. I accept that at least 3 people should be able to occupy the 3-bedroom home without any possibility of overcrowding. I also have considerable concerns about the landlord's position that they need to credit check flatmates or other occupants. There is no privity of contract between a flatmate and a landlord. The financial position of a family member or a flatmate should not impact on the tenant's weekly legal obligation to pay the rent. I find the landlord's position in this matter to be unreasonable and, in my opinion, extends the landlord's 'control' over the occupants of the property to an unreasonable extent. I also consider the landlord's demand for a fee to consider a variation of the maximum numbers to be unreasonable and unenforceable. In this instance, the tenant was making a simple request to use the other 2 bedrooms for prospective flatmates and the landlord's response, being to demand a fee and insist on a credit check of potential flatmates, was unreasonable and an interference with the tenant's quiet enjoyment of his home.

35. I award $350.00 for breach of quiet enjoyment. In reaching an amount of compensation, I have taken into account that the tenant did not in fact advertise for flatmates, although I accept that he was dissuaded by the landlord's position.

Should exemplary damages for retaliatory notice be awarded?

36. On 20 April 2018 the landlord served a 90 day written notice to vacate.

37. On 6 June 2018, the Tribunal declared the landlord's 90-day notice dated 20 April 2018 to be retaliatory and set aside. The adjudicator was satisfied that

the landlord was motivated by the tenant's complaints about the cleanliness and repairs required at the premises.

38. The landlord says they never received any notice of the hearing in respect of retaliatory notice and therefore did not attend the hearing. Therefore, the landlord's submissions about the reasons for serving the notice were never considered by the tribunal. Crocker's say the owner instructed them to serve the 90 day notice as the tenant had recently contacted the owner's accountant by email on 19 April 2018. The landlord says the tenant's action in contacting the owner's accountant together with concerns by the property manager Zainub Sullivan about her personal safety were the motivating factors in giving the notice to vacate.

39. The owner Daya Singh, giving evidence by teleconference, says she received a call from the agent Ms Sullivan who suggested that the tenant be given a 90-day notice. The agents appearing at the hearing say the property manager was concerned about harassment from the tenant and this is why she suggested a 90-day notice.

40. The tenant says the owner's accountant is the registered address for the owner's company and the unreasonable actions taken by Crocker's agents in managing this tenancy was the reason for making contact in the first place. The tenant vigorously denies harassing the agent.

41. After considering all the evidence on this issue, I am not persuaded there was any suggestion of harassment by the tenant towards the property managers during this tenancy. There was no evidence offered by the property managers in support of their allegations that the property manager felt concerned about her safety. Ms Sullivan did not give any evidence or any statement, and I understand she no longer works for Crocker's. I have formed the view that this allegation has likely been raised at the hearing at a late stage in an attempt to justify Crocker's actions. It was abundantly clear on the evidence that the tenant was complaining about the unprofessional actions of the property manager and the on-going repairs and maintenance issues at the property (multiple emails were presented from the tenant). It was also clear from the owner that the suggestion of the 90-day notice came from the property manager Ms Sullivan and not from the owner.

42. I am satisfied on a balance of probabilities that the 90-day notice was retaliatory and that exemplary damages are justified. Retaliatory notice is an unlawful act attracting exemplary damages of a maximum of $4,000.00.

43. Under section 109 (3) RTA I must consider a number of factors being the effect of the retaliatory notice, the interests of the person committing the unlawful act and the public interest. I am not required to consider the intent of the person committing the unlawful act in an application for retaliatory notice.

44. I am satisfied that the impact on the tenant was that he was required to search for a new property immediately, less than 5 months after the commencement of the tenancy. This led to stress and inconvenience for the tenant. Balanced

against this, I observe that the landlord waived the 21-day notice allowing the tenant to leave quickly after finding a new tenancy. There is a strong public interest in preventing landlords from serving 90 day notices on complaining tenants. This public interest element was the motivation for parliament to make retaliatory notice unlawful in this first instance. I award exemplary damages in the amount of $1000.00.

45. The tenant is awarded the filing fee as he has been largely successful.

B Harvey
30 November 2018

Please read carefully:

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT **TENANCY SERVICES 0800 836 262**.

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Rehearings:

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The ***only*** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. Being unhappy or dissatisfied with the decision is not a ground for a rehearing. (See 'Right of Appeal' below).

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days after the date of the decision to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than $1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than $1,000.

There is a $200.00 filing fee payable at the time of filing the appeal.

Enforcement:

Where the Tribunal made an order that needs to be enforced then the party seeking enforcement should contact the Collections Office of the District Court on **0800 233 222** or go to www.justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.